

## Quasi-Judicial Land Use Proceedings: No Doubting Thomases Allowed!

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### **Introduction**

Expert appraisers have testified that the proposed development will not adversely affect values of properties adjacent to this new development. Nevertheless, the testimony does not seem right to you. You remember the Great Financial Crisis – what do appraisers really know? Based upon your common sense understanding of real estate values and the way real estate markets really work, you suspect that the development will adversely affect adjacent property values. Can you be a Doubting Thomas and conclude that this admissible evidence simply does not persuade you?

This is one of the questions addressed by the North Carolina Court of Appeals in the case of *Dellinger v. Lincoln County*, 2106WL3894687 (July 19, 2016). As explained by the Court of Appeals, no Doubting Thomases are allowed in quasi-judicial land use proceedings.

### ***Dellinger v. Lincoln County***

#### **1. Facts**

The Dellingers leased land to Strata Solar (SS) for installation and operation of a solar energy farm (New Development). The New Development is allowed as a conditional use and SS applied for a conditional use permit in July 2013.

The County conducted two sets of quasi-judicial hearings in connection with SS's application – one set before the planning board in September and November and another set in December before the Board of Commissioners (Board). In December 2013, the Board denied SS's application finding that the application did not satisfy two standards: (1) the New Development will not substantially injure the value of adjoining properties and (2) the New Development will be in harmony with the area. The Dellingers appealed the denial of the application to Superior Court.

Because the Dellingers did not participate in the quasi-judicial proceeding, the Superior Court limited the Dellingers appeal to two questions: (1) was the Board's decision supported by the record and (2) was the decision arbitrary and capricious. Both questions required a review of the whole record.

The Superior Court determined that the record lacked substantial evidence to support the Board's determination that the New Development will not be in harmony with the area. The Board did not make sufficient findings for the Superior Court to review whether the Board's determination as the standard relating to substantial injury to the value of adjoining properties was supported competent, material and substantial evidence in the record. Therefore, the Superior Court remanded this issue to the Board for it to make sufficient findings.

On Remand, the Board denied the application again, finding that SS had met its "burden of production" but "the evidence unpersuasive." p. 6. In short, the Board doubted the credibility of SS's appraisal evidence as to no substantial injury to the value of adjoining properties and denied the application for that reason.



Article By  
[John C Cooke](#)  
[Womble Bond Dickinson \(US\) LLP](#)  
[North Carolina Land Use Litigator](#)  
[Real Estate](#)  
[Litigation / Trial Practice](#)  
[North Carolina](#)

The Dellingers sought review by the Superior Court of this new determination. The Superior Court affirmed the denial of the application, finding that SS had not submitted substantial, competent evidence to support a conclusion that the New Development would not substantially injure the value of adjoining property. p. 6-7. The Dellingers appealed to the North Carolina Court of Appeals.

## **2. North Carolina Court of Appeals**

In order to produce a *prima facie* case, an applicant must produce competent, material and substantial evidence tending to establish compliance with the requirement of the local ordinance.

The Court of Appeals reviewed the evidence presented by SS regarding no substantial injury to adjacent property values. SS had produced opinion testimony given by two expert real estate appraisers that the New Development would not injure adjoining property values. Both appraisers had undertaken market studies that were the basis of their opinions. Accordingly, the Court of Appeals found that SS had produced a *prima facie* case satisfying the standard of no substantial injury to adjoining property.

The Court of Appeals noted that the North Carolina Supreme Court had stated that (1) a *prima facie* case entitles an applicant to issuance of the requested permit and (2) a denial of a permit should be based upon findings “which are supported by competent, material and substantial evidence appearing in the record.” p.5 (quoting Humble Oil, 274 NC. 458, 471 (1974)). Here, the Board’s denial of the permit rested upon a finding that the Board doubted the credibility of a *prima facie* case - not competent, material and substantial evidence in the record which is contrary to the evidence in SS’s *prima facie* case. Therefore, the Court of Appeals reversed the Superior Court’s decision.

The Court of Appeals remanded the case to the Board “for additional quasi-judicial proceedings, utilizing the proper legal procedures and standards,” which held the applicant and adjacent property owners “to their respective burdens of proof.” p. 9.

### **Comments**

1. Written Findings are Important. This case began three (3) years ago, when SS filed its application for a conditional use permit. Now, having held multiple quasi-judicial hearings, two trips to the Superior Court and one trip to the Court of Appeals, the matter requires “further quasi-judicial proceedings.” Why?

Under law, the Board makes findings and the Judicial Branch review findings for errors of law. The Court of Appeals noted that there were 24 witnesses presenting evidence during the two nights of the hearing before the Board. In other words, the record contained a lot of evidence.

Was the defect a mistakenly written finding? For instance, did the Board rely on admissible evidence in the record produced by opponents to the New Development to deny the permit?

Or, was the evidence produced by the opponents either not admissible or less persuasive than SS’s evidence? In that case, the original finding was factually correct and legally ineffective. Only the Board can say.

2. Note the Distinction. The Court of Appeals expressly observed that a “reviewing court should not replace the [Board’s] judgment as between two reasonably conflicting views... [and a reviewing court] may not substitute its judgment for that of the [Board].” p. 4. In *Dellinger*, the Court of Appeals declines to substitute its opinion for the Board. Instead, the Court of Appeals concludes that doubting the credibility of competent, material and substantial evidence in a *prima facie* case is insufficient grounds for denying a land use permit. Why?

Being a Doubting Thomas without an evidentiary basis suggests a lack of impartiality and all parties at a quasi-judicial proceeding are entitled to an impartial decision-maker that bases its decision upon only upon evidence in the record.

3. The Seamless Web of the Law. *Dellinger* does not involve interpreting a land use law. Nevertheless, the Court of Appeals sets out, as the first authority in the *Analysis* portion of its opinion, a quotation from the North Carolina Supreme Court regarding the controlling canon of interpretation for land use regulations. Why?

The controlling canon is that all ambiguities in land use regulations are construed in favor of the free use of land. It is possible that an applicant for a land use permit entitled to an impartial decision-maker *and* one which decides evidentiary ties in favor of the free use of land. As Justice Oliver Wendell Holmes wrote, the law is a seamless web - one relevant area of law informs another.

In any event, Doubting Thomases are not allowed in quasi-judicial land use proceedings.

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